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7 Patenaude & Felix, A Professional Corporation  
and Raymond Alcide Patenaude

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

**NO HEARING DATE NOTICED**

28 BANKSTON V. PATENAUME & FELIX ET AL. (CASE NO. C 07 03396 JW PVT)  
DEFENDANTS' OBJECTIONS TO DECLARATION OF FRED SCHWINN IN SUPPORT OF AWARD OF ATTORNEY'S  
FEES AND COSTS

1 Defendants PATENAUDE & FELIX, A.P.C. and RAYMOND ALCIDE  
 2 PATENAUDE (“Defendants”) hereby object to the Declaration of Fred W.  
 3 Schwinn in Support of Award of Attorney’s Fees and Costs.

4

5 **OBJECTIONS**

6 Defendants object to the Schwinn Declaration on the grounds that:

7 1. Plaintiff has failed to file a regularly noticed motion;  
 8 2. Plaintiff failed to accept Defendants’ Rule 68 Offer of Judgment; and  
 9 3. The attorney’s fees requested by counsel for Plaintiff are  
 10 unreasonable and excessive.

11

12 **STATEMENT OF FACTS**

13 On or about June 28, 2007, Plaintiff filed suit against Defendants alleging  
 14 violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692,  
 15 *et seq.* On December 19, 2007, Defendants served an Offer of Judgment on  
 16 Plaintiff, pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Offer  
 17 read in pertinent part as follows:

18 Judgment shall be entered against Patenaude & Felix, A.P.C. and Raymond  
 19 A. Patenaude in the total amount of One Thousand One Dollars (\$1,001.00)  
 20 for statutory damages, plus Zero Dollars (\$0.00) in actual damages, plus  
 attorneys fees and taxable costs in the amount of Two-Thousand Five  
 Hundred Dollars (\$2,500.00).

21 Declaration of Tomio B. Narita In Support of Defendants’ Objections (“Narita  
 22 Declaration”), at ¶ 2. Plaintiff did not accept Defendants’ Rule 68 Offer. *See id.*

23 Subsequently, the Court granted summary judgment in favor of Plaintiff and  
 24 awarded her damages in the amount of \$250.00. *See Order Granting Summary*  
 25 *Judgment*, Doc. 28 (June 13, 2008). Plaintiff’s counsel, Fred Schwinn, then filed  
 26 his declaration requesting attorney’s fees, as well as the supporting declarations of  
 27 two other consumer attorneys. Plaintiff, however, did not file a motion for

1 attorney's fees or a supporting memorandum. Nor did Plaintiff meet and confer  
 2 with Defendants prior to filing these declarations. *See* Narita Declaration at ¶ 3.  
 3

4 **ARGUMENT**

5 **A. PLAINTIFF MUST FILE A MOTION FOR AN AWARD OF  
 ATTORNEY'S FEES**

6 This Court's local rules 54-1(a) and 54-6(a) provide that a motion for an  
 7 award of attorney's fees must be filed with fourteen days after  
 8 entry of Judgment in the action. *See* L.R. 54-6(a). The Rules further provide that  
 9 the parties must meet and confer for the purpose of resolving all disputed issues  
 10 relating to attorney's fees before making a motion for award of attorney's fees.  
 11 *See* L.R. 54-6(b)(1).

12 Judgment was entered in this action on June 13, 2008. Plaintiff filed her  
 13 attorney's fees declarations on June 27, 2008, but did not file a noticed motion and  
 14 supporting memorandum, as required by the Local Rules. Nor did Plaintiff meet  
 15 and confer with Defendants prior to filing her declarations. For these reasons,  
 16 Plaintiff's request for attorney's fees should be denied.

17 **B. PLAINTIFF FAILED TO ACCEPT A REASONABLE RULE 68  
 OFFER OF JUDGMENT**

18 The consumer in an FDCPA suit should be denied attorney's fees for the  
 19 work done after the offer of judgment where the offer was sufficient to settle the  
 20 case. *See* Fed. R. Civ. P. 68; *Lee v. Thomas & Thomas*, 109 F.3d 302 (6th Cir.  
 21 1997). Here, Defendants served Plaintiff with a Rule 68 Offer of Judgment on  
 22 December 19, 2007. Defendants offered to have judgment entered against them in  
 23 the amount of \$1,001.00 in statutory damages, plus \$2,500.00 for attorney's fees  
 24 and costs. At that time, the case was in its infancy and the settlement offer was  
 25 reasonable, given the amount of costs and attorney's fees incurred to date.  
 26 Plaintiff did not accept this Offer.

1       Although Plaintiff later prevailed on her summary judgment motion, the  
 2 Court awarded only \$250.00 in statutory damages, less than one-fourth the amount  
 3 of statutory damages previously offered by Defendants. Defendants' Rule 68  
 4 Offer was eminently reasonable, especially given the fact that the attorney's fees  
 5 requested by Plaintiff are unreasonable, as discussed below. Thus, Plaintiff's  
 6 request for attorney's fees after the Offer of Judgment was served should be  
 7 denied.

8       **C. THE ATTORNEY'S FEES REQUESTED ARE  
 9            UNREASONABLE AND EXCESSIVE**

10      Plaintiff's counsel, Fred Schwinn, requests an hourly rate of \$300.00 per  
 11 hour. This is excessive. Defendants submit that an hourly rate of \$225.00 to  
 12 \$250.00 is reasonable and in line with other cases in this jurisdiction, such as *Abad*  
 13 *v. Williams, Cohen & Gray*, 2007 WL 1839914 (N.D. Cal. June 26, 2007), where  
 14 the court awarded \$250.00 per hour to FDCPA counsel with much more  
 15 experience than Mr. Schwinn.

16      Additionally, the hours claimed by Mr. Schwinn are unreasonable. For  
 17 example, Mr. Schwinn seeks to recover \$30.00 each for numerous entries for  
 18 "Receive and Review," to review e-mails and documents that would undoubtedly  
 19 take 15 seconds or less to "review." Further, the preparation of some documents  
 20 including Discovery (on 10/12/2007) billing 3.0 hours for a total of \$900.00 seems  
 21 excessive since much of the discovery is standard and requires little work.  
 22 Therefore, these amounts should be reduced as well. *See, e.g., Kinh Tong v.*  
 23 *Capital Management Servs. Group, Inc.*, 2008 WL 171035 (N.D. Cal. Jan. 18,  
 24 2008) (reducing hours claimed by Mr. Schwinn from 65.5 to 18 based on "court's  
 25 judgment of what hours would have been necessary to expend to resolve the case  
 26 if counsel had reasonably focused on that agenda").

## **CONCLUSION**

Because Plaintiff has failed to comply with the Court's Local Rules by filing a properly noticed motion, her request for attorney's fees should be denied. Alternatively, Plaintiff's request for attorney's fees incurred after the date the Offer of Judgment was served should be denied, and the hourly rate and hours claimed are unreasonable and should be reduced.

Respectfully submitted,

DATED: July 15, 2008

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